

Seton Hall University eRepository @ Seton Hall

Law School Student Scholarship

Seton Hall Law

5-1-2014

Copyright is Not a Laughing Matter in Stand-Up Comedy

Joseph Hladki

Follow this and additional works at: https://scholarship.shu.edu/student_scholarship

Recommended Citation

Hladki, Joseph, "Copyright is Not a Laughing Matter in Stand-Up Comedy" (2014). *Law School Student Scholarship*. 494.
https://scholarship.shu.edu/student_scholarship/494

“Copyright is Not a Laughing Matter in Stand-Up Comedy:”

Joseph Hladki, Jr.¹

Submitted 1/20/14

I. INTRODUCTION.

- A. History of Stand-Up Comedy, the Beginning of Theft in the Industry.
 - 1. Vaudeville Give Birth to the Stand-Up Comic:
 - 2. The Post-Vaudeville Era A Change in Stand-Up Comedy but Not in its Joke Theft::
 - 3. The “Modern Era” of Stand-Up Comedy With a Good Old Feel of Joke-Theft:

II. BARRIERS FACED BY STAND-UP COMEDIANS.

- A. The Economic Barrier:
 - 1. The Real World Implications of the Economic Barrier in the Stand-Up World:
- B. Doctrinal Barrier in the Copyright law:
 - 1. The Copyright Statute:
 - 2. The Idea/Expression Dichotomy:
 - a. The Idea Gets the Laugh But Not the Protection in the Stand-Up World, The Idea-Expression Dichotomy Implications in the Real World of Stand-Up Comedy:
 - 3. The Merger Doctrine:
 - a. The Issue is Not the Expression it’s the Idea, The Merger Doctrine in Real World Stand-Up Comedy:
 - 4. Independent Creation:
 - a. “Independent Creation,” Sword or Shield in Real World Stand-Up Comedy:
 - 5. Fair Use:
 - a. Fair Use is Not Fair at All When it Comes to Stand-Up Comedy:
 - 6. Scenes A Faire Doctrine:
 - a. The Necessity in Using Common and Rudimentary Elements in Stand-Up Comedy:

III. MODERN DAY NORMS IN STAND-UP COMEDY.

- A. The Norm Against Appropriation:
 - 1. Similarities and Differences Between Legal and Industry Norms in the Process of Dealing with “Joke-Stealing”:
 - a. Detection:
 - b. Process:
 - c. Enforcement:
 - i. Public Ridicule as Enforcement of Industry Norms against the Theft of Jokes:
 - ii. Refusal to Deal With an Alleged Joke Thief as Enforcement of Industry Norms against the Theft of Jokes:
 - iii. Violence as an Industry Norm as a Tactic to Enforcement:

IV. POSSIBLE SOLUTIONS TO COPYRIGHT ISSUES IN THE STAND-UP WORLD.

- A. Fighting a Losing Battle, Taking on the Doctrinal Barriers Head On:
 - 1. The Doctrinal Barriers, the Immovable Object When Applied to Stand-Up Comedy:
 - 2. State Copyright Right Protection as a Form of Protection for Stand-Up Comics:
 - a. Common Law Protection as a Solution to the Doctrinal Barriers:
 - i. Applying Common Law Protection to Stand-Up Comedy and the Issue of Federal Preemption:
 - B. Time to Protect Stand-Up Comedy Under an Already Existing Form of Protection:
 - C. A Sui Generis Proposal of Protection for a Sui Generis Art Form:
 - 1. The Moral Thing to do is to Apply Moral Rights to Provide Protection for Stand-Up Comedy:
 - a. The Visual Artists Rights Act of 1990 Approach to Protecting Stand-Up Comedy:
- V. CONCLUSION.**

INTRODUCTION

You find out your favorite comedian will be performing at a local venue and you become overjoyed with the knowledge that you will get to see him/her perform. You pay for your ticket and wait anxiously until show night. On the eve of the show you are ready to laugh the night away but unexpectedly a huge verbal fight breaks out. Your favorite comedian and another comedian break out into an all-out battle over joke-theft.²

This was the scene at a widely known and respected comedy club, “The Comedy Store”, in Los Angeles, California where comic, Joe Rogan³, was performing in February of 2007.⁴ Rogan and popular comedian, Carlos Mencia⁵ exchanged verbal slurs and fighting words after Rogan spotted Mencia in the crowd and accused him of stealing his friend’s stand-up routine and jokes.⁶ A spectator/patron of the show may be confused and ask why such an incident would transpire. One may even ask “surely there must be some set of rules to prevent this?”⁷

This article is presented to answer this question, as well as to demonstrate a need for stronger protection under the Copyright law in the world of stand-up comedy. This article will take the reader from the past to present, establishing the history of the stand-up comedy as well as the current battles it faces with protection under the current Copyright Act. This article will conclude with possible solutions to the current inadequacies found in the Copyright law pertaining to the art form of Stand-Up comedy.

A. History of Stand-Up Comedy, the Beginning of Theft in the Industry.

1. Vaudeville Gives Birth to the Stand-Up Comic:

Stand-up comedy, though not directly rooted, has a history beginning in what has become known as the “Vaudeville Era.”⁸ A Vaudeville show usually consisted of a plethora of

“gimmicks,”⁹ with an assortment of acts involving singing, dancing, juggling, acrobatics, magic, miming, and storytelling.¹⁰ “Comedians” in the vaudeville era appropriated material from other performers.¹¹ For example, these performers, often if not mainly, concentrated their “gig”¹² around well know plays, and sang portions of songs from popular operas.¹³ Originality was not a priority in this era.¹⁴

The Vaudeville era of “comedy” was ruled by the “One-Liner” joke style.¹⁵ The importance of a joke in this time period seemed to focus more on the delivery of the One-Liner rather than on the content, which made up the joke.¹⁶ For example, a common “gig” performed by a “comic” in the Vaudeville era would look something like this: “There was a beautiful young woman knocking on my hotel room door all night! I finally had to let her out. A car hit an elderly Jewish man. The paramedic says, 'Are you comfortable?' The man says, 'I make a good living.' I just got back from a pleasure trip. I took my mother-in-law to the airport.”¹⁷ Thus, based on the time period, vaudeville “comedians” thrived on the art of appropriation, telling as many jokes as possible to get a ruse out of the audience.¹⁸ The act of appropriating another’s material was the norm of the day with a complete lack of law enforcement to deter these performers from stealing another’s act or joke.¹⁹

2. The “Post-Vaudeville Era” A Change in Stand-Up Comedy but Not in its Joke Theft:

The Vaudeville era seemed to fade as technology in the U.S. improved.²⁰ The emergence of media, such as, radio, film and later TV, made the touring Vaudeville acts obsolete.²¹ Comedians now performed at local bars, casinos, clubs and hotels.²² Performances at these establishments are not what we think of today. Comics were not and did not headline their bills, instead, “comics were forced to perform “between sets” at these venues.”²³ This limited space,

both in time and the physical size of the stage, meant that the comic had to forgo the vaudeville style of all around entertainer, and focus on what made him/her special, the comedy.”²⁴

Based on this limited time to perform, comedians needed to string together as many jokes as possible.²⁵ A continued appropriation of others’ material from the Vaudeville era was still largely in effect.²⁶ These comics still used much of the past Vaudeville feel in their gigs.²⁷ “For example, they told strings of jokes that ranged over a wide variety of topics and had little narrative or thematic connection to one another.”²⁸ Comics in this era began to maintain “joke archives” which consisted of many unique jokes created by either the comic or their writers and jokes performed and created by others.²⁹ These “joke archives” also included material from newspapers, comic strips and books,³⁰ which indeed seems to be a style taken from the Vaudeville era, where comics appropriated material from relevant time period.³¹ However, post-Vaudeville stand-ups seemed to refine their material, either stolen or original, a far cry from the era in which joke and “gags” were basically taken verbatim.³²

3. The “Modern Era” of Stand-Up Comedy With a Good Old Feel of Joke-Theft:

A change from the Vaudeville and post-Vaudeville style of stand-up comedy took place in the 1950s and 60s in the Stand-Up world. Many comics shifted from the “One-Liner” style to a monologue based comedy. “Modern stand-up reflects greater emphasis, relative to the vaudeville and post-vaudeville periods, on comedic narrative; that is, on longer, thematically linked routines that displace the former reliance on discrete jokes.” “The narrative content is linked, moreover, to the individual comedian's point of view, manifested as a comedic character which bears particular traits and remains fixed throughout the performance.” “The dominant

trend, in other words, is a movement from the one-liner to a more discursive style with jokes woven into a persona-driven narrative monologue.”³³

Though a shift has been made; many comics still appropriate other comic’s materials.³⁴ Although a more monologue style of joke telling has captured the art, jokes still have an inherent similar undertaking. The heart of jokes seems to be based on similar ideas, however, expressed in different styles. This has been seen and is frowned upon by Stand-Up comedians today. For example:

“You know, a lot of people ask me if Steve Martin is my real name. Have I changed it for show business or anything like that. And now I’m not ashamed to admit it, and I did have a funny name before show business. But I think enough time has gone by and audiences are more sophisticated now that they won’t laugh at my real name. Um, my real name is bibadabidibadabidi. See my parents had a sense of humor, my sister’s name was hilhilhilhil. And my mother would go out to call us for dinner, she’d go, bibadabididababidi, hilhilhilhil. So I had to move around a lot.”³⁵

Thirty years later, in his 2005 Album entitled “Retaliation,” on the track “My Son Optimus Prime,” Dane Cook tells his audience the following joke on naming his children:

“I think about having kids. I’d love to have some kids. I’ve been thinking about kids. I wanna have like 19 kids. I think naming them, that’s gonna be fun. Whatever the names you come up with, that’s exciting, right there. You get to both decide, “Hey, do you wanna name that . . . nooo I don’t like that. Alright.” It’s like a little game, you try and come up with . . . I already have names picked out. I don’t even know. First kid, boy, girl. . . I don’t care. First one that comes out I’m naming it RHRHRHH. I think it’s beautiful. It’s feminine but strong at the same time. “Time for bed RHRHR.. I SAID TIME FOR BED RHRHRHRHHR!!!! NO COOKIES RHRHRHR!!!! Typical RHRHR!! Daddy’s on the phone RHRRH . . . daddy’s on the phone”³⁶

That same year, in 2005, Louis CK did an HBO special on naming your children:

“I love my daughter, it’s a lot of responsibility that you never think about. Like, you gotta name you kid. That’s a big deal right there. You know what amazes me? You can name your kid anything you want. Isn’t it incredible? There are no laws. There should be a couple of laws. None. You can literally name your kid anything. You can name your kid with no vowels if you want. Like Psnsndltn. Or

ffffffffffffffffffffffffffffffff. Just forty f's, that's his name. Ffffffffffffffffffffffffffffffffff go clean your room. Some people name their kids a word like Sunshine or Battery or Whatever. I'd like to name my kid a whole phrase, you know, like Ladies And Gentleman, that'd be a cool name. This is my son Ladies And Gentleman. Then, when he gets out of hand, I get to go, Ladies and Gentleman, please!""³⁷

Thus, this example is only one out of many instances where a multitude of Stand-Up comedians tell a joke premised on the same underlying idea. Therefore, though a shift has been made in the modern era of Stand-Up comedy, a consistent trend of appropriation of materials and ideas still continue today.

I. BARRIERS FACED BY STAND-UP COMEDIANS

Stand-Up comedy has been an art form in this country since the early nineteenth century and has flourished in its popularity overtime.³⁸ Despite its many years of existence, case law is lacking when it comes to issues faced by these artist under the American Copyright Act.³⁹ A lack of protection under the current Act and practical economic barriers have all but eliminated aggrieved Stand-Up comics from ever setting foot into a courthouse to seek legal adjudication.⁴⁰

A. The Economic Barrier:

A major barrier at the onset, though not linked directly to the copyright law, is the cost of actual litigation (attorney fees, court fees, etc.).⁴¹ This, in itself, is a deterrent to many less famous, non-wealthy comics who do not have the time or resources to proceed to litigation.⁴²

Furthermore, the legal system in itself creates a major economic barrier because, "the law's requirement, as a predicate to the award of statutory damages and attorneys' fees, that the author register the work prior to the commencement of the infringing conduct."⁴³ "The cost of registration--a \$45 fee (\$35 if registration is completed online)⁴⁴ plus the time involved-- is low

but not trivial compared to the market value of the typical joke.”⁴⁵ To register each joke or skit would amount to an enormous expenditure of money to register a joke that may not be popular. “Perfecting routines and developing jokes, takes much time and many club performances, during which the constituent jokes and bits would remain unregistered.”⁴⁶

1. The Real World Implications of the Economic Barrier in the Stand-Up World:

When stepping into the shoes of a Stand-Up comedian, the economic barriers presented by undertaking a lawsuit are not hard to see. Stand-Up comics like any other person who considers filing his or her grievance with the court system quickly realize that legal fees often amount to tens of thousands of dollars.⁴⁷ Realization of this astronomical fee is the first major barrier to Stand-Up comics, especially when the typical market value of a joke is about fifty (\$50) to two-hundred (\$200) dollars compared to a copyright attorney who charges anywhere from one-hundred and fifty (\$150) to one-thousand (\$1,000) dollars per hour.

Furthermore, the law mandates that each work be registered prior to suit in order to receive damages is a major economical barrier to Stand-Ups. First, unlike other artist, Stand-Ups can create hundreds or thousands of jokes in one sitting. Today’s stand-up comic is one who puts a routine together through monologue, not “one-liners.”⁴⁸ Registering each would be uneconomical since it would take numerous performances before finding which joke actually works in front of a live audience, thus the Stand-Up comic would be wasting money registering jokes he or she may never use again.⁴⁹

Nonetheless, some Stand-Up comics have registered their works, thus, this use of the registration system by comedians confirms some level of awareness of the copyright law within the stand-up community. However, this awareness has not translated into litigation.⁵⁰ Comedians

have responded that “lawsuits are expensive, the chances of winning are low, and-- importantly-- lawsuits are “just not the way it's done” among comics.”⁵¹

Finally, and perhaps most significant, is the fact that there is a lack of litigation in this area.⁵² It is also important to note that the only litigations that have been brought and subsequently settled without much litigation have been brought by Stand-Ups such as Jeff Foxworthy,⁵³ a Stand-Up who has gained worldwide recognition and has made millions upon millions of dollars.⁵⁴

B. Doctrinal Barrier in the Copyright law:

“In addition to the expense of registrations and lawsuits, there are doctrinal hurdles that make joke stealing lawsuits unlikely, in many cases, to succeed.”⁵⁵ The following sections under section B will provide a general application of some but not all doctrinal barriers. The barriers that will be explained will show why comedians balance the cost of a suit against the chance of success. “Because jokes vary widely in their length, structure, and dependence on stock versus original elements, it is difficult to provide an exhaustive account of the application of copyright doctrine in this area and impossible within the scope of this Article.”⁵⁶

1. The Copyright Statute:

The subject matter protected under current copyright laws as codified in 17 U.S.C. 102 states:

“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6)

motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works. (b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”⁵⁷

The copyright law as stated above protects artist who create an original work of authorship. However, as seen in Alfred Bell & Co. v. Catalda Fine Arts, “variations of works in the public domain can be copyrighted if the new "author" contributed something more than a "merely trivial" variation, but no large measure of novelty is necessary.”⁵⁸ This along with other issues in the art of stand-up comedy has limited litigation between aggrieved parties. Copyright protection in Stand-Up comedy and more generally joke telling, has seemed to be flimsy, and non-existent.

The following sections will provide the obstacles faced in Stand-Up copyright world that differs from most other art forms protected under the Copyright Act.

2. The Idea/Expression Dichotomy:

It is a fundamental principle that copyright law protects only the expression of an idea and not the idea itself.⁵⁹ Section 102(b) of the 1976 Copyright Act states: “In no case does copyright protection for an original work of authorship extend to any idea . . . regardless of the form in which it is described, explained, illustrated, or embodied in such work.”⁶⁰ “In many cases, then, the finder of fact must determine “the line between expression and what is expressed.””⁶¹

“There is hardly a single principle of copyright law that is more basic or more often repeated than the so-called idea-expression dichotomy. The Doctrine is followed dutifully as an unquestioned principle in hundreds of cases: the “ideas” that are the fruits of an author’s labor go

into the public domain, while only the author's particular expression remains the author's control."⁶² This principal has been repeated throughout case law in the copyright field. Judge Learned Hand in Nichols v. Universal Picture Corp.⁶³, opinion articulated this point exactly when stating, "Ideas, apart from their expression is not property extended to the author."⁶⁴

a. The Idea Gets the Laugh But Not the Protection in the Stand-Up World, The Idea-Expression Dichotomy Implications in the Real World of Stand-Up Comedy:

Stand-Up comedians conveying a joke are really conveying an idea.⁶⁵ The joke is only funny and receives laughter and applause because it is the common idea which the audience can relate to which gives it pop.⁶⁶ Thus, applying the idea-expression dichotomy to jokes leaves comedians with little protection in many instances of joke stealing.⁶⁷

The argument has been made that jokes told by comedians are no more than basic ideas.⁶⁸ This rationale is based on the argument that jokes hold the same idea, thus by expressing that similar idea differently; one can lawfully appropriate the joke leaving no room to bring a suit.⁶⁹ The copyright treatise itself states that "the value of a joke often lies in its idea rather than its particular expression, this serves to severely limit the value of any copyright."⁷⁰

This is blatantly clear in the example of the joke about naming ones child, which was told and retold over again by Steve Martin, Dane Cook and Louis C.K. The jokes are very similar in the idea itself, but they are not the same. If copying was done by any of those comics, the re-cast of expression would delineate from the original idea leaving little to no room for a strong cause of action in copyright infringement.

3. The Merger Doctrine:

Another barrier placed on stand-up comics is the merger doctrine. It has been stated that even if a joke can be seen and protected as an expression and not an idea, it will be defeated based on the assumption that the expression is so closely linked to the joke's central idea that copyright is prohibited by the merger doctrine.⁷¹ In Nichols v. Universal Picture Corp., the Court held that ideas by themselves are not protected by copyright, and when the idea intertwines with the expression such that it is impossible to separate them, the expression is said to have "merged with the idea," leaving both idea and expression unprotected.⁷²

Furthermore, in Morrissey v. Procter & Gamble⁷³, the court stated that when expression of an idea is so limited, which restricts the number of ways the idea may be expressed, the expression will not be protected.⁷⁴ Moreover, though the Morrissey court found that there was substantial access and copying performed, nonetheless, the court held that no infringement had taken place based on the court's concern of limiting future use of an idea based on the Merger Doctrine.⁷⁵

a. The Issue is Not the Expression it's the Idea, The Merger Doctrine in Real World Stand-Up Comedy:

When it comes to the real world issue of the merger doctrine in stand-up comedy, the doctrine intended to limit protection of expression is not a cause for concern. Today's Stand-Up comedian tells his or her jokes through monologue, thus giving each Stand-Up his or her own style and expression.⁷⁶ Thus, a Stand-Up comic could take another comic's joke change the arrangement of word and perform in it a different style and therefore be found to be acting within the guidelines of the copyright law.⁷⁷

Thus, the merger doctrine in Stand-Up Comedy does not provide any real protection to a Stand-Up comic, instead, it provides a loop hole for other comics to appropriate work to make it their own without any legal ramification.⁷⁸

4. Independent Creation:

Another copyright barrier in stand-up comedy is independent creation. When determining independent creation, Courts examine substantial similarity between the works. This issue is of major concern. Many comics do not copyright their jokes in such a way which would allow them to bring a federal copyright claims. “To establish copyright infringement, a plaintiff must prove two elements: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.”⁷⁹ Thus, the first major hurdle is not met. However, looking past this, agreeing a valid copyright is held by a party, independent creation creates a major barrier.

To overcome independent creation, it must be proven that one party had access to the other work and that there is a striking similarity between the two works in question.⁸⁰ Based on the burden of proof required, the barrier of independent creation can in one aspect severely limit the art form of stand-up comedy and on the other hand could open the flood gates for “joke-theft.” Comedians today extract their material from their lives. This means material can very easily be borne from everyday conversations, suggestions, or from watching another comedian perform.⁸¹ Therefore, while the material may be “independently created,” it may not appear that way to the ordinary observer or to the trier of fact. A subconscious taking of material is still considered appropriation.⁸² However, if a handful of comedians tell the same joke revolving around current events; it would be very difficult to prove that infringement occurred, especially if the jokes are released at or around the same time of the current event.⁸³

a. “Independent Creation,” Sword or Shield in Real World Stand-Up Comedy:

Based on the application of independent creation in relation to Stand-Up comedy, who knows what the trier of fact may decide. Stand-Up Comics are always inventing new and funny jokes; however, they are also performing them. Their performances, intended for the audience, are nevertheless also performed in front of other comics, managers and friends.⁸⁴ Thus, it could be an easy argument to make that the “infringing” comic had access to the joke. Conversely, unknown or new Stand-Up comics may have a hard time proving independent creation, if their joke is appropriated by a famous Comic who gets the joke on TV first.

Thus, independent creation could become a double edged sword in which the appearance of substantial similarity could protect a true innovator and at the same time hurt him/her because an ordinary trier of fact could find a substantial similarity. Such is the following example which could lead to confusion under this barrier:

“In January 2006, Carlos Mencia was the next to tell a version of the joke: “Um, I propose that we kick all the illegal aliens out of this country, then we build a super fence so they can't get back in and I went, um, ‘Who's gonna build it?’”

Then, in October 2006, D.L. Hughley incorporated a similar joke into his act:

“Now they want to build a wall to keep the Mexicans out of the United States of America, I'm like ‘Who gonna build the mother****er?’” Finally, in November 2006, George Lopez performed this joke: “The Republican answer to illegal immigration is they want to build a wall 700 miles long and twenty feet wide, okay, but ‘Who you gonna get to build the wall?’”⁸⁵

5. Fair Use:

A common defense to all copyright infringement claims is the defense of fair use.⁸⁶ In Folsom v. Marsh, Justice Story articulated in the courts opinion the method by which to

determine whether a use is fair or not.⁸⁷ Justice Story's opinion has been largely adopted and codified in the Copyright act of 1976 under section 107 of the Act.⁸⁸ Section 107 states:

“Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”⁸⁹

Since the passage of the Copyright Act of 1976, the Supreme Court has recognized that, under section 107 of the Act, anyone who makes a fair use of a copyrighted work does not infringe the copyright on that work.⁹⁰ The Supreme Court has stressed that fair use disfavors bright line rules and favors individualized analysis based on the section 107 factors as applied to the facts of each case.⁹¹ To aid the lower courts in their analyses when dealing with the defense of fair use, the Supreme Court has attempted to provide some guidance on what should be considered under each of the section 107 factors.

In Campbell v. Acuff-Rose, the court provided some guidance in relation to the first factor under section 107.⁹² In determining “Purpose and Character of the use,” the court considered whether the protected work had been transformed or whether it had been merely duplicated.⁹³ In Campbell, the court noted that where the work has been found to be transformative as to create a new work that serves to inform and enlighten the public, fair use

will be found.⁹⁴ The court further noted that mere copying will be found to weigh against the first factor under section 107.⁹⁵

Moreover in Harper & Row Publishers, Inc. v. Nation Enterprises, the court made clear that under the first factor, commercial versus non-commercial use will weigh heavily in determining “Purpose and Character.”⁹⁶ However, the court noted that pure commercial use will not be per se element weighing against fair use.⁹⁷ Rather, “the crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”⁹⁸ Thus, under the first factor, the court must determine whether a transformative or duplicative work has been made and what profit has been made from that use.⁹⁹

Turning to the Second factor under section 107, “Nature of the Copyrighted Work,” the Supreme Court in Harper again provided guidance on how this factor should be weighed.¹⁰⁰ The court stated that “this factor requires courts to consider the breadth of protection.”¹⁰¹ Reiterating this point, the court in Campbell stated “when the issue of fair use is raised, factual or historical works tend to receive less protection than creative works of fiction or fantasy.”¹⁰² Furthermore, the Campbell court went on to illuminate the third factor under section 107, “Amount and Substantiality,” stating that courts must look at both qualitative and quantitative use.¹⁰³ Thus, by the courts rationale, not only will the courts consider how much work was taken, but also it will consider whether what was taken; was the “heart of the work” thereby finding against fair use.

The final factor under section 107, “Effect on the Market Place,” has been determined to be a question of harm.¹⁰⁴ No actual proof of current or definite future harm is required, all that is needed is “some meaningful likelihood that future harm exists.”¹⁰⁵ “Although section 107 lists

four factors to be considered in each fair use analysis, Congress did not foreclose consideration of other factors that may pertain to an individual fair use determination. In addition to the statutory factors, the Supreme Court has considered the good faith, or lack thereof, of the copier and the public benefit derived from increased access to the work.”¹⁰⁶

a. Fair Use is Not Fair at All When it Comes to Stand-Up Comedy:

The Fair Use factors in themselves create an issue for any comic to use this defense against one who is labeled a “Joke-Thief.” Since the issues that arise between comics and their jokes are based on the underlying idea of the joke, fair use becomes inapplicable to their situation. Due to an idea’s inability to be protected, another comedian’s use of that idea will always be fair since the law provides for such use.¹⁰⁷ Unless, one comedian takes verbatim another comic’s “gig,” the fair use doctrine has no plausible application in the Stand-Up world.¹⁰⁸

Furthermore, the ability to use the fair use doctrine to either protect a work or find infringement is connected to the economic barrier faced by Stand-Up Comics.¹⁰⁹ In order for a Stand-Up comic to either prove or disprove each factor under section 107, based on the guidance set forth by the Supreme Court, extensive legal research and aid would be needed.¹¹⁰ This would lead to extensive legal fees, which besides the elite Stand-Up comics who could afford this, would not be economically sound for the majority.¹¹¹

6. Scenes A Faire Doctrine:

Another Doctrinal barrier faced by Stand-Up comics under the current Copyright law is the doctrine of “Scenes a Faire.” “The doctrine of scenes a faire has its roots both in the idea/expression dichotomy and the fundamental copyright requirement of originality.”¹¹² Scenes a Faire in its most basic usage refers to the treatment of characters, plots, or other elements that

are so basic as to be considered “indispensable.”¹¹³ The Seventh Circuit in Gaiman v. McFarlane, interpreted the doctrine to mean that infringement will not be found where the elements in dispute are so “rudimentary, commonplace, standard, or unavoidable that they do not serve to distinguish one work within a class of works from another.”¹¹⁴

Furthermore, and maybe more directly on-point with Stand-Up comedy today, the Court in Hoehling v. Universal City Studios, stated that when trying to depict a historical or fictional scene, certain elements used to depict these types of works are so necessary as to not be copyrightable under the law.¹¹⁵ Thus, it can be seen why the doctrine is so closely tied to the idea/expression dichotomy and the requirement of originality. Scenes a fair material is as common in our history and human idea as to not constitute originality but a common idea held in the public domain by all.¹¹⁶

a. The Necessity in Using Common and Rudimentary Elements in Stand-Up Comedy:

As stated earlier, Stand-Up comedians when telling a joke are really conveying an idea. The joke is only funny and receives laughter and applause because it is the common idea which the audience can relate to which gives it pop.¹¹⁷ Thus, in the modern monologue era of telling jokes, setting up a scene of a dysfunctional family or a boy falling in love with a girl is necessary.¹¹⁸ However, these scenes have been held by the court to be “rudimentary, commonplace, standard, or unavoidable that they do not serve to distinguish one work within a class of works from another,”¹¹⁹ thus, not provided any protection under the copyright law.¹²⁰

Therefore, because Stand-Up comics use these familiar scenes and elements in their plots and set-ups to their jokes, the scenes a faire doctrine will always apply to their work, which in turn will always limit the protection afforded to comic under the Act.

II. MODERN DAY NORMS IN STAND-UP COMEDY.

Based on the economic and doctrinal copyright barriers placed on Stand-Up comedians and their art form, Stand-Ups have devised their own system, commonly called “norms”, to deal with joke theft.¹²¹ The lack of legal protection, primarily in copyright, has led the Stand-Up comedy community to rely on its community norms to self-regulate their art form which tends to lack any formal legal proceeding.¹²² The stand-up community has replaced copyright law with an internal system of dealing with “joke-thieves.”¹²³ This community has established so many norms that to deal with each would be outside the scope of this paper. The norms that will be presented below focus on the issue of appropriation in the stand-up comedy world and how the artists resolve these issues.

A. The Norm Against Appropriation:

Similar to copyright law, the industry norm follows a pattern of how to deal with someone who is believed to be infringing an artist (comedians work).¹²⁴ “The major norm that governs the conduct of most stand-up comedians is a strict injunction against joke stealing.”¹²⁵ The norm of dealing with an issue of joke theft, much like the process one would take in a legal copyright action, follows a similar procedure of: detection, process, and enforcement.¹²⁶

1. Similarities and Differences Between Legal and Industry Norms in the Process of Dealing with “Joke-Stealing”:

Most, if not all, disputes arising out of joke theft are resolved through the industry norm system.¹²⁷ The norms seem to follow closely to the legal process found under the copyright laws.¹²⁸

a. Detection:

The common starting ground under both the norm system and the copyright process begins with detection of possible infringing activities.¹²⁹ Under copyright law, detection of infringement is usually discovered by either the creator of the work or his/her agent when publicly displayed.¹³⁰ In the Stand-Up comedy world, detection can arise on many levels, either through the Stand-Up comic him or herself seeing the infringing routine, hearing about it from other comics or by comedy club owners.¹³¹

“On a typical stand-up bill there are usually several (sometimes as many as eight or even ten) comedians. The comedians on the bill will often watch each other, motivated in part by curiosity and the desire to see new talent, but also for the purpose of detecting joke stealing from themselves, from their friends, or from the classics. Given this exposure to their peers’ material, many comedians are well-placed to detect appropriation. When the community detects an instance of apparent joke stealing, comedians enforce a sort of “prison-gang justice.””¹³²

b. Process:

Under copyright law, a copyright owner who detects copying might first seek a negotiated settlement.¹³³ “If that avenue proves fruitless, the copyright owner must file a lawsuit and make out a prima facie case of infringement, which includes proof by the plaintiff that the defendant copied.”¹³⁴ Under the comedians' norms system, the initial step is also a form of negotiation.¹³⁵ Usually, the comics will talk about the joke and try to come to amicable solution, either, one will stop using the joke, or both agree it’s an independent creation, or that both will no longer tell the joke.¹³⁶ However, if the negotiation process does not work and both comics express that an agreement is futile, filing of a lawsuit is not their next step.¹³⁷

c. Enforcement:

The usual outcome of a failed attempt to negotiate the matter of “joke-theft” leads to self-regulated remedies within the Stand-Up community.¹³⁸ Thus, there are three usual remedies which the community norms provide for when enforcement is needed against one who is considered to be “joke-stealing.”¹³⁹ One option is public ridicule, another is to ostracize the “joke-stealer,” and finally, physical violence, which is rarely used in today’s stand-up comedy world.¹⁴⁰

i. Public Ridicule as Enforcement of Industry Norms against the Theft of Jokes:

Public ridicule is used to injure a comedian’s reputation in the Stand-Up community.¹⁴¹ Injuring a comedian’s reputation and labeling him or her as one who steals jokes severely hurts the comedian’s ability to work and pursue a career in the art form.¹⁴² Public ridicule puts other comedians on notice of potential joke theft by the “joke-stealing” comedian and alerts the consumer public that going to see this comedian’s show will be nothing more than a collage of other performer’s material.¹⁴³

Public ridicule has never been more prevalent or effective in enforcing the norms of Stand-Up comedy than in the case of Joe Rogan and Carlos Mencia.¹⁴⁴ Late in February of 2007, Rogan, who was performing at a comedy in club in Los Angeles publicly, confronted Mencia for stealing his fellow comedian and friend’s joke.¹⁴⁵ After the dispute was over, Rogan continued to pursue the matter to enforce the community norm that “joke-stealing” will not be tolerated.¹⁴⁶ “Rogan continued to press his case in radio interviews, and in the following weeks a number of other comics joined the feud, most siding with Rogan. Rogan also posted a clip on YouTube

citing examples of what he took to be Mencia's thievery."¹⁴⁷ Since this time, Mencia's popularity has declined.

ii. Refusal to Deal With an Alleged Joke Thief as Enforcement of Industry Norms against the Theft of Jokes:

A second retaliation option often employed is to refuse to appear on the same bill with a known joke thief.¹⁴⁸ This can be, for the accused joke-stealer, a painful sanction.¹⁴⁹ Ostracizing a joke thief would severely impede that comic's ability to find work.¹⁵⁰ Also, based on the comic's reputation and lack of fellow comedians' willingness to work with this comedian, comedy club owner ostracize them from performing at their venues.¹⁵¹ Club owners do not want to book a comedian who has stolen a joke.

Ostracizing a comedian ultimately deprives that comedian from pursuing the art form of Stand-Up comedy. Being limited to the clubs that comic can perform at, or the other acts that will work with the alleged thief, limits his or her exposure in an already highly competitive field. Ostracizing joke thieves is an industry norm of enforcement that not only limits the possibility of joke theft but also limits the amount of the artist in this industry.

iii. Violence as an Industry Norm as a Tactic to Enforcement:

The least used form of enforcement in the comedy world is violence. Not much has been written on the subject; however, there are some known instances of violence being used when joke theft has been detected. Comedian George Lopez, accused Mencia of incorporating thirteen minutes of his material into one of Mencia's HBO comedy specials.¹⁵² "According to his boasting on the Howard Stern Show in 2005, Lopez grabbed Mencia at the Laugh Factory comedy club, slammed him against a wall, and punched him."¹⁵³

III. POSSIBLE SOLUTIONS TO COPYRIGHT ISSUES IN THE STAND-UP WORLD

“The Congress shall have Power To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹⁵⁴ As Justice Stewart once explained¹⁵⁵: “The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”¹⁵⁶

This section will provide rebuttals based on case law and legal theory, to the doctrinal copyright barriers, such as, idea/expression dichotomy, the merger doctrine, independent creation, fair use, and scenes a faire faced by Stand-Up comics. In responding to these doctrinal barriers, it will be shown that case law in other protected copyrightable subject matter does not bridge the gap between the lack of protection for Stand-Up comedy and the current law. Based on this, the article will then provide a *Sui Generis*¹⁵⁷ form of protection under the current law and outside of it. Based on the inability of the current law to adequately protect this art form, it will be shown that Stand-Up comedy is in a category of its own making it unique and requiring more than the current law offers. The *Sui Generis* protection proposal will show how the art form of Stand-Up comedy needs to either expand or develop new law from the current copyright law to provide aggrieved parties with solutions that end up being interpreted and decided by a judge or jury and not through Stand-Up comedy’s self-regulated community norms.

A. Fighting a Losing Battle, Taking on the Doctrinal Barriers Head On:

The task of trying to advocate around the doctrinal barriers faced by Stand-Up comics is not a simple undertaking. Due to the lack of case law, precision in dissecting court opinions and establishing arguments to the contrary may be futile.¹⁵⁸ However, attempting to complete this

task may provide the relief needed. By establishing that the art form of Stand-Up comedy is not analogist to other protected subject matter under section 102 of the Act, the door may be opened to establishing other legal forms of protection.¹⁵⁹

1. The Doctrinal Barriers, the Immovable Object When Applied to Stand-Up Comedy:

“In many respects, humor would appear to be no different from any other copyrightable genre. It can be written down, performed, filmed, etc. Yet in one essential way it differs from other material eligible for intellectual property protection: the aspect that differentiates one piece of humor from another is not the aspect which is protected by intellectual property law,” the idea.¹⁶⁰

As it was held in Baker v. Seldon,¹⁶¹ copyright protects only the expression of an idea, but not the idea itself.¹⁶² For most copyrightable subject matter, the expression is what makes the work what it is, either widely popular or not.¹⁶³ The United States Copyright Office's "Compendium II of Copyright Office Practices," defines comedy as falling within the protection of non-dramatic literary work.¹⁶⁴ Thus, when a copyright infringement claim arises in the area of literary works, the courts evaluate the details, “particular wordings and writing style, substantial plot elements, character names, and the general “feel.””¹⁶⁵

However, when it comes to jokes, more specifically Stand-Up comedy, evaluating infringement based on case law for literary works is not proper.¹⁶⁶ “There is often a central idea that makes a joke funny, but which is capable of several kinds of expression. What we find funny is some aspect of an idea we hadn't thought of, or the sudden juxtaposition of a second idea. Next to this gimmick, this kernel of humor, the particular expression can only be secondary.”¹⁶⁷ It is

this idea, the idea that the audience relates to which makes the joke funny, not the manner in which it is expressed.

Thus, the current copyright law focuses on details and expressions, interpreted by the courts to follow the guidelines of the idea-expression dichotomy, the merger doctrine, independent creation, fair use, scenes a faire and other copyright doctrines when comparing two works.¹⁶⁸ Nonetheless, what is does not compare is what makes Stand-Up comedy unique, what sets Stand-Up comedy apart from literary works or any other copyrightable subject matter under section 102. It fails to evaluate what is at the heart of every joke, the idea, thereby inadequately providing protection for the art form.¹⁶⁹

Therefore, trying to attack each and every doctrinal barrier placed by the copyright law in the path of Stand-Up comedy would be futile. The current law has been shaped, formed, and interpreted in such a way that; though useful in other protected subject matter areas, nonetheless, falls short in Stand-Up Comedy. Thus, it may be time for the Copyright Act to take a second look at how Stand-Up comedy is protected under its' law.

2. State Copyright Right Protection as a Form of Protection for Stand-Up Comics:

Federal Copyright law has provided little protection for Stand-Up comics, mainly because the Federal Copyright Statute does not accept that ideas are copyrightable subject matter.¹⁷⁰ Nevertheless, throughout the history of copyright protection, case law has shown and provided State protection of ideas and claims for misappropriation.¹⁷¹ However, State protection of ideas and misappropriation has run into the issue of Federal preemption, which has posed an additional barrier to protection in many cases under State Copyright protection.¹⁷²

a. Common Law Protection as a Solution to the Doctrinal Barriers:

Though common law may provide artist with protection for the submission of their ideas, not all ideas submitted under common law will receive protection.¹⁷³ Generally, for an idea to be protected under State common law, the idea must be both novel and concrete.¹⁷⁴ When it comes to novelty, courts generally require that the idea reflect some aspect of inventiveness or a mere quantity of creative genius beyond what generally is known in the trade to proffer originality to the author.¹⁷⁵ In addition to novelty, court generally require that an idea also be concrete, in that “idea must be embodied in a tangible form that is readily perceivable, or it must be elaborated and developed sufficiently, even if only orally communicated, so that it can be identified as the plaintiff’s work and distinguished from the efforts of others.”¹⁷⁶

Common law protection for idea submission has been most successful when based on a contract theory of law.¹⁷⁷ This type of action under common law is known as a Desny claim.¹⁷⁸ Under a Desny claim an author does not need to show that the idea is novel and concrete but that the submission of the idea to another created an implied contract.¹⁷⁹ Under a Desny claim it must be shown that the disclosure is a substantial benefit to person to whom it is disclosed, and therefore may be consideration for a promise to pay.¹⁸⁰

Moreover, not only does an author under common law have a claim under idea submission and implied contract theory, an author may also be able to bring a cause of action based on common law misappropriation.¹⁸¹ “Common law misappropriation “is normally invoked in an effort to protect something of value not otherwise covered by patent or copyright law, trade secret law, breach of confidential relationship, or some other form of unfair

competition.” “Claims for misappropriation that merely allege copying, however, will be deemed preempted by the Copyright Act.”¹⁸²

Under common law misappropriation, States may have different elements that must be established. Commonly discussed and often cited however, are the elements required either under California or New York law. Under California law, a claim for misappropriation may be established where:

“(a) the plaintiff invested substantial time, skill or money in developing its property, (b) the defendant appropriated and used plaintiff’s property at little or no cost to the defendant, (c) the defendant’s appropriation and use of the plaintiff’s property was without the authorization or consent of the plaintiff, and (d) the plaintiff can establish that it has been injured by the defendant’s conduct.”¹⁸³

“Absolute novelty and originality is required to state a claim for misappropriation in an idea submission case under New York law.”¹⁸⁴

i. Applying Common Law Protection to Stand-Up Comedy and the Issue of Federal Preemption:

Common law idea protection has been a valuable tool for authors’ who have pitched ideas for movies or television shows.¹⁸⁵ However, it seems more difficult to apply in the world of Stand-Up comedy. First, a Stand-Up comic trying to raise common law protection would first have to show that his/her joke was novel and concrete.¹⁸⁶ Proving concreteness of the joke could be easily accomplished; having the joke videotaped or providing a written form of the joke would meet the requirement of the idea being in tangible form.¹⁸⁷ Nevertheless, even though a comic may be able to provide the concreteness of the idea, the comic would still have to provide its novelty, that is, it is originality to the comic.¹⁸⁸ This may prove to be a daunting task, especially when jokes are based on common ideas shared by many. However protection may be warranted if the comic has put together commonly known elements in a unique fashion.¹⁸⁹ Thus,

if the comic can show that a unique arrangement of ideas that leads to a combination originating with him or herself, novelty may be met. If the comic provides both of these requirements, a good argument could be made that common law protection applies, however, this protection would be only in the state in which provides such common law protection and would not have the force and effectiveness of federal protection.

Moreover, a comic could in theory provide a Desny claim. This out of all common law protections would prove most difficult. Stand-Up comics do not pitch ideas; they tell ideas to the general public to get a laugh that is their job. A Desny claim establishes an implied contract for the pitch of an idea with the assumption of compensation in return.¹⁹⁰ Therefore, in order to prove a Desny claim, it must be shown that a substantial benefit has been bestowed upon another which would be consideration for payment.¹⁹¹ Since the call of this article is about Stand-Up comic's issues with joke theft and not about pitching jokes or ideas to television companies or movie productions, it would be a difficult claim to raise as between Stand-Up comics.

Finally, a Stand-Up comic may be most successful when raising a common law misappropriation claim. As stated, each State that allows for such a claim may have different elements that must be met, under California law; a Stand-Up comic has a good chance of establishing each element and therefore forming a sufficient common law misappropriation claim. Under California law, the Stand-Up comic must show that: (1) substantial time, skill or money was invested in developing the joke, (2) the alleged joke thief appropriated and used the Stand-Up's joke at little or no cost, (3) the alleged joke thief appropriation and use of the Stand-Up's joke was without the authorization or consent of the Stand-Up comic, and (4) the Stand-Up comic was injured.¹⁹² Additionally, for New York protection, novelty and concreteness must also

be established.¹⁹³ Thus, if it can be shown that an alleged joke thief had substantial access to the comic's material, a Stand-Up comic could find adequate protection under the common law.

This being stated, it is important to note that though a comic may look to State common law protection, a comic must be weary of Federal preemption. "Federal copyright laws preempt state law claim where subject matter of state law falls within the subject matter of copyright law and state law assertions are equivalent to exclusive rights protected by federal copyright law."¹⁹⁴ Thus, if a Stand-Up comic did not provide an "extra-element" to take the claim outside of federal protection or did not require a remedy not covered by the federal laws, the claims would be preempted by federal copyright law and most likely dismissed.¹⁹⁵ Such an extra element would be one such as a Densy claim, involving the theory of contract law and not copyright law, therefore providing an extra element not within the federal statute and providing a remedy not conceived under copyright but under contract.¹⁹⁶

B. Time to Protect Stand-Up Comedy Under an Already Existing Form of Protection:

Since it is clear that the current Copyright Act lacks sufficient protection for Stand-Up comedy, it may be time to recognize a different approach in acquiring protection for Stand-Up Comedy under the Copyright Act. It has been made clear that copyright does not afford protection of ideas, the merger of ideas and expression, fair use of public domain materials and scenes faire elements.¹⁹⁷ Thus, the answer may be to forge a new argument under the current Copyright Act and look past protecting Stand-Up comedy under section 102 of the Act and amend the current law.

Section 103 of the Copyright act states:

(a) "The subject matter of copyright as specified by § 102 includes compilations and derivative works, but protection for a work employing

preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.”(b) “The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.”¹⁹⁸

Section 101 of the Act states that, “A ‘compilation’ is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.”¹⁹⁹ Compilations consist of un-copyrightable individual elements.²⁰⁰ Section 101 and 103 were codified in the 1976 Copyright Act based on the Supreme Courts holding in Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.,²⁰¹ The Feist court stated that for a compilation to attain protection under the copyright law, “requires the presence of all three elements for copyright to subsist: (1) a collection and assembling of preexisting materials, facts, or data (2) that are then selected, coordinated, or arranged (3) into a work that, by virtue of that selection, coordination, or arrangement, may be said to constitute, as a whole, an “original work of authorship.”²⁰² In enacting section 103, Congress, intended that compilers have free access to the underlying information. “It did not intend that a second compiler retrace the steps of the first to create an identical work but rather, it intended that the second compiler use the first's work to advance that work to create something new.”²⁰³

Therefore, compilations seem to only apply to the original arrangement of facts.²⁰⁴ However, due to the nature of Stand-Up comedy, Section 101 and 103 should be amended to include ideas. Allowing compilation to include the original arrangement of ideas in Stand-Up comedy would not violate the goals of Copyright.²⁰⁵ Due to compilations consisting of un-

protected elements, the idea itself would not be protected, however, the original arrangement of how the idea is used would be.²⁰⁶ Thus, under the requirements set forth by Feist, an independently created joke consisting of a general underlying idea which has a modicum of originality to it may be protected in the manner in which it is arranged to be told.

Furthermore, making this kind of amendment would be consistent with the goals of copyright and of congressional intent in codifying section 103. The goal of copyright is “To promote the Progress of Science and useful Arts.”²⁰⁷ Moreover, congressional intent under section 103 is to “advance the original work to create something new.”²⁰⁸ Allowing section 103 to be amended to include ideas, would promote the art of Stand-Up comedy (Copyright Goal) by precluding Stand-Ups from telling the same jokes over and over again in the same way and instead incentivize the artist to create a new work based on the original arraignment (Congress Intent).

Thus, applying section 103 to the art form of Stand-Up comedy may provide some relief to Stand-Up Comics. Under Feist, unprotected works such as historical fact are protected when arranged in way that is original and unique providing protection to the arrangement, not the underling un-copyrightable facts.²⁰⁹ Therefore, the “stuff” that makes Stand-Up comedy what it is, the idea of a joke, the scenes a fair used to articulate the idea of the joke, and the final expression of the joke will be protected in its arrangement and not in their individual capacities.²¹⁰ Thus, while copyright law under section 102 will not protect a joke based on the doctrinal barriers, section 103 provides protection for the original arrangement of the joke, finding infringement for duplicating that protected arrangement.²¹¹

Therefore, section 103 can be seen to apply to a Stand-Up “gig” or routine. It will protect the independently created arrangement of jokes that meets the minimum requirement of originality.²¹² Thus, while the idea of the joke itself will still not be protected, the way the joke is told, the order it is arranged to have effect, and the fact chosen to express the joke, will all be provided with protection in that single arrangement as a compilation.²¹³

C. A Sui Generis Proposal of Protection for a Sui Generis Art Form:

As it has been seen, the art form of Stand-Up comedy is unique to the laws of Copyright.²¹⁴ Stand-Up comedy is an art form that relies on ideas, which unfortunately, are not a subject matter protected under the current Copyright Act.²¹⁵ In fact, Stand-Up comedy operates outside the color of copyright law, labeled as a protected art form, however, receiving little to no protection.²¹⁶ Stand-Up comedy thrives because it is in the business of making people laugh based on ideas, expression of those ideas, and usage of common themes and elements.²¹⁷ Nevertheless, these areas which make Stand-Up comedy thrive, are the same areas which Copyright places a limit to its protection.²¹⁸ Therefore, Stand-Up Comedy is unique to Copyright and as such requires a Sui Generis form of protection is required.

1. The Moral Thing to do is to Apply Moral Rights to Provide Protection for Stand-Up Comedy:

The purpose for protection of authors’ exclusive rights under the Copyright Act is based on the economic principle that the consumer benefits by the incentives given to authors to produce copyrighted works.²¹⁹ By contrast, a number of other countries and signatories of the Berne Convention²²⁰ recognize the moral right of the authors, which treats the authors’ work not just as an economic interest, but as an inalienable, natural right and an extension of the artist’s personality. “Moral rights presume that the author's creative process not only results in a tangible

product that is subject to the demands of, and mobility within, the marketplace, but also reflects the personality and “self” of the author, indeed, her creative soul.”²²¹ Commonly, moral rights afford authors’ protection in the rights of disclosure, attribution, and integrity.²²²

“The disclosure right provides that, as the master of the work, only the author can determine when her work is complete and when it is ready for publication and public review. Once the work is published, the right of attribution ensures that the author (and no one else) will receive attribution as its creator. Related to the right of attribution is the protection from misattribution, which protects authors against attribution to works they did not create, and the right to demand anonymous or pseudonymous authorship. Lastly, the right of integrity, which most underscores the personality interest of the author protects against significant alteration of the work or such derogatory use of it that is contrary to the author's intentions.”²²³

To date, the United States, though a signatory to the Berne Convention, has refused to implement all of the moral rights established at the Berne Convention.²²⁴ However, the United States adopted the Visual Artists Rights Act of 1990 (“VARA”), recognizing limited moral rights under U.S. law.²²⁵

Based on a study performed by the University of New Mexico’s psychology and anthropology department, a Stand-Up comedian’s personality and characteristics are directly linked to the performance he or she puts on.²²⁶ Though the study was intended to show the different characteristic and personalities of Stand-Up comedians as compared to non-comedians, the study produce a direct correlation between the performances and comedic writing styles to that comic’s personality and characteristics.²²⁷ Based on this study, science has proven that a Stand-Up comic work product is a direct reflects of the comic him or herself.²²⁸ Therefore, because Moral Rights presume “that the author's creative process not only results..... but also reflects the personality and “self” of the author, indeed, her creative soul,” this presumption can be seen to relate to the art form of Stand-Up comedy.²²⁹ Based on Stand-Up comedies direct

correlation to the comics self in his or her work, the art form directly speaks to the presumption and thereby the protections under Moral Rights.²³⁰

Moreover, because Moral Rights focus on an author's personal rights instead of his or her economic rights, the form of relief granted under Moral Rights is analogist to the relief sought through the Stand-Up community norms.²³¹ Stand-Up comics, when settling issues of "Joke-Theft," through their community norms, do not seek monetary relief immediately.²³² All that seems to be sought is either, the thief refraining from continuing to use the joke, or publicly letting the community know the joke was original to him or her through the enforcement phase of the norms.²³³ Thus, while copyright provides an economic relief for infringement, the Stand-Up comic seeks attribution and integrity of his or her work through the norm system, which is exactly the relief granted under Moral Rights. Therefore, the relief granted under Moral Rights is more applicable to the relief already sought and attained by Stand-Up comics in comparison to the relief granted by copyright law.

a. The Visual Artists Rights Act of 1990 Approach to Protecting Stand-Up Comedy:

The United States has adopted and codified in section 106(A) of the Copyright Act VARA.²³⁴ VARA is a recognized codification of authors' Moral Rights and grants the rights of attribution and integrity.²³⁵

"Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art--(1) shall have the right--(A) to claim authorship of that work, and(B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;(2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and (3) subject to the limitations set forth in section 113(d), shall have the right--(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion,

mutilation, or modification of that work is a violation of that right, and (B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.”²³⁶

However, VARA only applies to works of visual art.²³⁷ Section 101 of the Copyright Act defines “works of visual art” as:

“A “work of visual art” is-- (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author. A work of visual art does not include-- (A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication; (ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container; (iii) any portion or part of any item described in clause (i) or (ii); (B) any work made for hire; or (C) any work not subject to copyright protection under this title.”²³⁸

Therefore, based on the protection VARA provides for works of visual art, and the categories of work defined as works of visual art, amending section 106(A) to include the art form of Stand-Up comedy may provide substantially more protection than the current law does.

IV. CONCLUSION

A stronger copyright law for protecting jokes will result in a higher production and growth in the comedy world.²³⁹ “Widespread acknowledgment of stronger copyright protection for jokes would economically reward comics capable of creating a relatively large body of unique material because, as the scenes á faire doctrine suggests, there will be less copyright protection for less original jokes that rely on common themes or stock concepts.”²⁴⁰ The

expansion of copyright protection for jokes would have a positive impact on comics as a class.²⁴¹

This expansion would extend the exclusive rights granted to every copyright holder, in other art forms, to the art of stand-up comedy which was the intent behind the law.²⁴²

Moreover, a stronger copyright protection for Stand-Up comics would regulate issues found in the art form in a court of law and not inside comedy clubs or over the air waves. Stand-Up comics would have an outlet to voice their concerns and seek the redress required without resolving to industry norms; which can lead to possible exclusion from the art or even violence. A stronger protection would advance the art of Stand-Up comedy.

¹ Author is a student at Seton Hall University School of Law.

² Kal Raustiala & Chris Sprigman, *The Vigilantes of Comedy*, Freakonomics (Mar. 30, 2010), <http://freakonomics.com/2010/03/30/the-vigilantes-of-comedy-a-guest-post/>.

³ See IMDB, Joe Rogan, <http://www.imdb.com/name/nm0736579/> (describing Joe Rogan as a comedian, actor and sports broadcaster) (last visited Jan. 19, 2014).

⁴ Raustiala and Sprigman, *supra* note 1.

⁵ See IMDB, Carlos Mencia, <http://www.imdb.com/name/nm0578788/> (describing Carlos Mencia as a famous comedian with a television show on comedy central, Mind of Mencia) (last visited Jan. 19, 2014).

⁶ Raustiala and Sprigman, *supra* note 1.

⁷ *Id.*

⁸ Dotan Oliar & Christopher Sprigman, *There's No Laugh (Anymore): The Emergence Of Intellectual Property Norms and The Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787, 1842 (2008)(citing Frank Cullen, Florence Hackman & Donald Mcneilly, *Vaudeville Old and New: An Encyclopedia of Variety Performers in America*, (2007).

⁹ "Gimmick." Merriam-Webster Online Dictionary, 2013, <http://www.merriam-webster.com> (a trick or device used to attract business or attention, also referred to as a "gig")(last visited Jan. 19, 2014).

¹⁰ Oliar and Sprigman, *supra* note 7 at 1842 (citing uanews, <http://www.youtube.com/watch?v=pElRiVQ7FXQ> (last visited Jan. 19, 2014) (discussing what vaudeville was and showing historical footage)).

¹¹ Oliar and Sprigman, *supra* note 7 at 1844.

¹² See *supra* note 8.

¹³ Oliar and Sprigman, *supra* note 10.

¹⁴ *Id.*

¹⁵ Yevgeniya Mikhaylova, Note, *Does Copyright Law Sit Down on Stand-Up Comedy*, St. John's Entertainment, Art and Sports Law Journal, (Vol. 1:31) at 42.

¹⁶ *Id.*

-
- ¹⁷ Shlomoh Sherman, *Vaudeville One Liners*, <http://shlomohsherman.com/comedy/vaudoners.html> (last visited Jan. 19, 2014).
- ¹⁸ Mikhaylova, *supra* note 14 at 42.
- ¹⁹ *Id.* at 43.
- ²⁰ Oliar and Sprigman, *supra* note 7 at 1846.
- ²¹ *Id.*
- ²² *Id.* at 1847.
- ²³ Jim Mendrinis, *The First Stand Up*, HISTORY OF COMEDY BLOG (Dec. 11, 2004, 1:00 AM), <http://historyofcomedy.blogspot.com/2004/12/first-stand-up.html>.
- ²⁴ *Id.*
- ²⁵ Oliar and Sprigman, *supra* note 7 at 1848.
- ²⁶ *Id.*
- ²⁷ *Id.* (citing Henry Jenkins, *What Made Pistachio Nuts? Early Sound Comedy and the Vaudeville Aesthetic*, 281-83 (1992)).
- ²⁸ *Id.*
- ²⁹ *Id.*
- ³⁰ *Id.* See *Bob Hope and American Variety: Joke File*, LIBRARY OF CONGRESS, <http://www.loc.gov/exhibits/bobhope/jokes.html> (last visited Jan. 17, 2014).
- ³¹ Oliar and Sprigman, *supra* note 7 at 1848.
- ³² *Id.* at 1850.
- ³³ *Id.* at 1852.
- ³⁴ Mikhaylova, *supra* note 14 at 46.
- ³⁵ *Id.* (citing STEVE MARTIN, *My Real Name*, on WILD AND CRAZY GUY (Warner Brothers 1989) (1978)).
- ³⁶ *Id.* (citing 1k03dy0u, *Dane Cook-My Son Optimus Prime*, YOUTUBE (June 17, 2008), <http://www.youtube.com/watch?v=PltVYQDDwgY>).
- ³⁷ *Id.* (citing Louis CK, *Kids Names*, finifinito, YOUTUBE (Mar. 29, 2009), <http://www.youtube.com/watch?v=WNSf-KQORRk> (last visited Jan. 19, 2014)).
- ³⁸ Oliar and Sprigman, *supra* note 7.
- ³⁹ Andrew Greengrass, *Take My Joke . . . Please! Foxworthy v. Custom Tees and the Prospects for Ownership of Comedy*, 21 COLUM.-VLA J.L. & ARTS 273, 277 (1997).
- ⁴⁰ *Id.*
- ⁴¹ Oliar and Sprigman, *supra* note 7 at 1799 (citing 17 U.S.C. §505 (2000)).
- ⁴² *Id.*
- ⁴³ *Id.*
- ⁴⁴ *Id.* (citing schedule of Copyright Office fees, see United States Copyright Office, Circular 4, <http://www.copyright.gov/circs/circ04.pdf> (last visited Jan. 18, 2014)).
- ⁴⁵ Oliar and Sprigman, *supra* note 7 at 1800.
- ⁴⁶ *Id.*
- ⁴⁷ Oliar and Sprigman, *supra* note 7 at 1799 to 1801.
- ⁴⁸ *Id.* at 1850.
- ⁴⁹ *Id.* at 1800.
- ⁵⁰ *Id.* at 1801.
- ⁵¹ *Id.*

⁵² Greengrass, *supra* note 38 at 273.

⁵³ JEFF FOXWORTHY, <http://www.jefffoxworthy.com/about> (describing Jeff Foxworthy as a famous stand-up comedian who has sold over 2.5 million units and is most famous for his “You may be a redneck” jokes)(last visited Jan. 19, 2014).

⁵⁴ *Id.*

⁵⁵ Oliar and Sprigman, *supra* note 7 at 1801.

⁵⁶ *Id.*

⁵⁷ 17 U.S.C. § 102 (2006).

⁵⁸ Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99, 102 (2d Cir. 1951).

⁵⁹ Greengrass, *supra* note 38 at 279.(citing Robinson v. Viacom International, Inc., 1995 WL 417076, at *1 (S.D.N.Y. Jul. 13, 1995).

⁶⁰ 17 U.S.C. §102(b) (2006).

⁶¹ Greengrass, Take My Joke, *supra*.

⁶² Edward Samuels, *The Idea-Expression Dichotomy In Copyright Law*, 56 TENN. L. REV. 321, 323(1989).

⁶³ Nichols v. Universal Pictures Corp., 45 F.2d 119, 122 (2d Cir. 1930).

⁶⁴ *Id.* at 121.

⁶⁵ Raustiala and Sprigman, *supra* note 1.

⁶⁶ *Id.*

⁶⁷ Oliar and Sprigman, *supra* note 7 at 1803.

⁶⁸ Elizabeth Moranian Bolles, *Stand-Up Comedy, Joke Theft, and Copyright Law*, 14 Tul.J. Tech. & Intell. Prop. 237, 249 (2011). (See, e.g., Metro-Goldwyn-Mayer, Inc. v. American Honda Motor Co., 900 F. Supp. 1287 (C.D. Cal. 1995); Cardtoons v. Major League Baseball Players Ass'n, 868 F. Supp. 1266 (N.D. Okla. 1994).

⁶⁹ Oliar and Sprigman, *supra* note 7 at 1803.

⁷⁰ Melville B. Nimmer, *The Law of Ideas*, 27 S. Cal. L. Rev. 119 (1954).

⁷¹ See Allen D. Madison, *The Uncopyrightability of Jokes*, 35 San Diego L. Rev. 111, 116 (1998).

⁷² Nichols v. Universal Pictures Corp., 45 F.2d 119, 122 (2d Cir. 1930).

⁷³ Morrissey v. Procter & Gamble, 379 F.2d 675 (1st Cir. 1967).

⁷⁴ *Id.* at 678.

⁷⁵ *Id.*

⁷⁶ Oliar and Sprigman, *supra* note 7 at 1850.

⁷⁷ Raustiala and Sprigman, *supra* note 1.

⁷⁸ See Oliar and Sprigman, *supra* note 7

⁷⁹ Susan Wakeen Doll Co., Inc. v. Ashton Drake Galleries, 272 F.3d 441, 450 (7th Cir. 2001). (citing Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 361 (1991)).

⁸⁰ Ty, Inc. v. GMA Accessories, Inc., 132 F.3d 1170 (7th Cir. 1997).

⁸¹ Mikhaylova, *supra* note 14 at 49.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Oliar and Sprigman, *supra* note 7 at 1818.

⁸⁵ Bolles, *supra* note 67 at 253-254, (citing Oliar and Sprigman, *supra* note 7 at 1804-05).

⁸⁶ 17 U.S.C. § 107

⁸⁷ Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841).

⁸⁸ See note 85.

⁸⁹ *Id.*

⁹⁰ Michael G. Frey, *Unfairly Applying the Fair Use Doctrine*, 66 U. Cin. L. Rev. 959, 966 (1998).

⁹¹ *Id.* (citing Acuff-Rose, 510 U.S. at 577 (stating that “[t]he task is not to be simplified with bright-line rules”). See also Harper & Row, 471 U.S. 560 (noting that no standard definition of fair use is possible); Sony, 464 U.S. 448 n.31.

⁹² Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579, (1994).

⁹³ *Id.* at 579.

⁹⁴ *Id.* at 580.

⁹⁵ *Id.* at 592.

⁹⁶ Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985).

⁹⁷ *Id.* at 562.

⁹⁸ *Id.* at 562.

⁹⁹ Frey, *supra* note 89 at 968.

¹⁰⁰ See Harper v. Nation, *supra* note 95.

¹⁰¹ *Id.* at 564.

¹⁰² Frey, *supra* note 89 at 968 (citing Acuff-Rose, 510 U.S. at 586).

¹⁰³ Acuff-Rose, *supra* note 91 at 576.

¹⁰⁴ Frey, *supra* note 89 at 970.

¹⁰⁵ Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984).

¹⁰⁶ Frey, *supra* note 89 at 972.

¹⁰⁷ Oliar and Sprigman, *supra* note 7 at 1830-1831.

¹⁰⁸ Acuff-Rose, *supra* note 91 at 588.

¹⁰⁹ Mikhaylova, *supra* note 14 at 51.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Matthew J. Faust, *What Do We Do with A Doctrine Like Merger? A Look at the Imminent Collision of the Dmca and Idea/expression Dichotomy*, 12 Marq. Intell. Prop. L. Rev. 131, 143 (2008).

¹¹³ *Id.* at 144 (citing Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp., 672 F.2d 607, 616 (7th Cir. 1982)).

¹¹⁴ Gaiman v. McFarlane, 360 F.3d 644, 659 (7th Cir. 2004)(citing Bucklew v. Hawkins, Ash, Baptie & Co., 329 F.3d 923, 929 (7th Cir.2003)).

¹¹⁵ Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 979 (2d Cir. 1980)

¹¹⁶ Leslie A. Kurtz, *Copyright: The Scenes A Faire Doctrine*, 41 Fla. L. Rev. 79, 98 (1989).

¹¹⁷ Raustiala and Sprigman, *supra* note 1.

¹¹⁸ *Id.*

¹¹⁹ Gaiman v. McFarlane, *supra* note 113 at 659 (citing Bucklew v. Hawkins, Ash, Baptie & Co., 329 F.3d 923, 929 (7th Cir.2003)).

¹²⁰ *Id.*

¹²¹ Oliar and Sprigman, *supra* note 7 at 1810.

¹²² *Id.*

¹²³ *Id.* at 1812.

¹²⁴ *Id.*

¹²⁵ Id.
¹²⁶ Id.
¹²⁷ Id. at 1810
¹²⁸ Id. at 1812.
¹²⁹ Id. at 1813
¹³⁰ Id.
¹³¹ Id.
¹³² Id.
¹³³ Id. at 1814.
¹³⁴ Id.
¹³⁵ Id.
¹³⁶ Id.
¹³⁷ Id. at 1815.
¹³⁸ Bolles, *supra* note 67 at 254-255.
¹³⁹ Id. at 254.
¹⁴⁰ Oliar and Sprigman, *supra* note 7 at 1791 (citing Eric Posner, *Law and Social Norms* 4,(2000) (making the point regarding the relation of law to social norms generally)).
¹⁴¹ Id. at 1816.
¹⁴² Bolles, *supra* note 67 at 254-255.
¹⁴³ Id. at 255.
¹⁴⁴ Raustiala and Sprigman, *supra* note 1.
¹⁴⁵ Id.
¹⁴⁶ Id.
¹⁴⁷ Id.
¹⁴⁸ Oliar and Sprigman, *supra* note 7 at 1817.
¹⁴⁹ Id.
¹⁵⁰ Id. at 1818.
¹⁵¹ Id.
¹⁵² Id. at 1797.
¹⁵³ Id. (citing Lopez, <http://www.redban.com/audio/lopez.mp3> at 0:40-1:46 (last visited Jan. 19, 2014) (providing George Lopez's description on the Howard Stern radio show of his physical attack on Mencia)).
¹⁵⁴ U.S.Const. Art. I, §8, cl. 8.
¹⁵⁵ Bolles, *supra* note 67 at 241 (citing Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975)).
¹⁵⁶ Id.
¹⁵⁷ “Sui Generis.” Merriam-Webster Online Dictionary, 2013, <http://www.merriam-webster.com> (in a class or group of its own; not like anything else)(last visited Jan. 18, 2014).
¹⁵⁸ See generally Greengrass, *supra* note 38.
¹⁵⁹ Mikhaylova, *supra* note 14 at 52.
¹⁶⁰ Greengrass, *supra* note 38 at 274.
¹⁶¹ Baker v. Seldon, 101 U.S. 99 (1879).
¹⁶² Id. at 102.
¹⁶³ Greengrass *supra* note 38 at 274.
¹⁶⁴ Compendium II: Compendium of Copyright Office Practices § 402.02.

¹⁶⁵ Greengrass *supra* note 38 at 274. (citing Beal v. Paramount, 20 F.3d 454 (11th Cir. 1994).

¹⁶⁶ Id.

¹⁶⁷ Id. at 274-275.

¹⁶⁸ See generally Oliar and Sprigman, *supra* note 7, Mikhaylova, *supra* note 14, Greengrass *supra* note 38.

¹⁶⁹ Id.

¹⁷⁰ Arthur R. Miller, *Common Law Protection for Products of the Mind: An "Idea" Whose Time Has Come*, 119 Harv. L. Rev. 703, 715 (2006).

¹⁷¹ Lindsey Weisselberg, Sui Generis Genius: How the Design Protection Statute Could Be Amended to Include Entertainment Pitch Ideas, 9 J. Marshall Rev. Intell. Prop. L. 184, 188 (2009)(citing Desny v. Wilder, 299 P.2d 257, 263-65 (Cal. 1956)).

¹⁷² Miller *supra* note 169 at 744.

¹⁷³ See generally Blaustein v. Burton, 9 Cal. App. 3d 161 (Ct. App. 1970), Desny v. Wilder, 299 P.2d 257, 263-65 (Cal. 1956).

¹⁷⁴ Miller *supra* note 169 at 723.

¹⁷⁵ Id. at 727, (citing Marcus Advertising, Inc. v. M.M. Fisher Assocs., 444 F.2d 1061, 1063-64 (7th Cir. 1971) (holding that an idea for an advertising slogan for root beer was not novel and was in the public domain); and Santilli v. Philip Morris & Co., 283 F.2d 6 (2d Cir. 1960) (holding that an idea for packaging cigarettes was not novel because of prior knowledge of the technique in the industry)).

¹⁷⁶ Id. at 723, (citing Bailey v. Haberle Congress Brewing Co., 85 N.Y.S.2d 51, 52 (Syracuse Mun. Ct. 1948), the court concluded in the alternative that the claim would be barred because the idea was not elaborated in material form.) and Jones v. Ulrich, 95 N.E.2d 113 (Ill. App. Ct. 1950) (the court stressed that the idea be defined in detail at the time of disclosure regardless of materiality since “it would seem arbitrary to protect the inventor against a breach of confidence only when he can immediately exhibit a material thing demonstrating his invention.” Id. at 120)).

¹⁷⁷ Desny v. Wilder, 299 P.2d 257(Cal. 1956).

¹⁷⁸ Id.

¹⁷⁹ Id. at 260-262.

¹⁸⁰ Id. at 266.

¹⁸¹ Miller *supra* note 169 at 718.

¹⁸² 2 E-Commerce and Internet Law 13.04 (2013-2014 update) (citing United States Golf Assn. v. Arroyo Software Corp., 69 Cal. App. 4th 607, 618 (1st Dist. 1999) and Information Handling Servs. v. LRP Publ'g Inc., Copy. L. Rep. (CCH) P28, 177 (E.D. Pa. 2000) (holding preempted a claim for misappropriation)).

¹⁸³ Id. (citing United States Golf Assn. v. Arroyo Software Corp., 69 Cal. App. 4th 607, 618, 81 Cal. Rptr. 2d 708, 714 (1st Dist. 1999).

¹⁸⁴ U.S. Golf Assn. v. Arroyo, *supra* note 182 (citing Nadel v. Play-By-Play Toys & Novelties, Inc., 208 F.3d 368 (2d Cir. 2000) (analyzing the novelty requirement in idea submission cases under New York law).

¹⁸⁵ See generally Blaustein v. Burton, 9 Cal. App. 3d 161 (Ct. App. 1970).

¹⁸⁶ Miller *supra* note 169 at 718-720.

¹⁸⁷ Id.

¹⁸⁸ Id.

¹⁸⁹ Id. (citing Those Characters From Cleveland, Inc. v. J.J. Gams, Inc., No. 86 Civ. 3180, 1992 WL 135580, at 9 (S.D.N.Y. Apr. 13, 1992) (“Concepts, even if generally known, may be protected from bad faith misappropriation if put together in a nonobvious way.” (citing Integrated Cash Mgmt. Serv. v. Digital Transactions, 920 F.2d 171 (2d Cir. 1990))).

¹⁹⁰ Desny v. Wilder, *supra* note 176 at 260-262 and 266.

¹⁹¹ Id. at 266.

¹⁹² 2 E-Commerce *supra* note 181.

¹⁹³ Id.

¹⁹⁴ Panizza v. Mattel, Inc., 02 CV 7722(GBD), 2003 WL 22251317 (S.D.N.Y. Sept. 30, 2003).

¹⁹⁵ Id. *see generally* Desny v. Wilder, *supra* note 176.

¹⁹⁶ Desny v. Wilder, *supra* note 176 at 733.

¹⁹⁷ *See generally* Oliar and Sprigman, *supra* note 7, Mikhaylova, *supra* note 14, Greengrass *supra* note 38.

¹⁹⁸ 17 U.S.C. § 103 (2006).

¹⁹⁹ 17 U.S.C. § 101 (2010).

²⁰⁰ Id.

²⁰¹ Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 363 (1991).

²⁰² Id. at 357 (quoting Mills Music, Inc. v. Snyder, 469 U.S. 153, 163 (1985)).

²⁰³ Timothy Young, *Copyright Law: Copyright Protection for Factual Compilations the White Pages of the Phone Book Are Not Original Enough to Be Copyrighted - but Why?--Feist Publications, Inc. v. Rural Telephone Service Co.*, 111 S. Ct. 1282, U. Dayton L. Rev. 631, 648 (1992) (citing H.R.REP. NO. 1476, 94th Cong., 2d Sess. 57 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5670-71)).

²⁰⁴ Feist v. Rural, *supra* note 200 at 348.

²⁰⁵ Oliar and Sprigman, *supra* note 7 at 1841.

²⁰⁶ Feist v. Rural, *supra* note 200 at 348.

²⁰⁷ U.S.C. Const. Art. I, §8, cl. 8.

²⁰⁸ Young *supra* note 202.

²⁰⁹ Id.

²¹⁰ *See generally* Oliar and Sprigman, *supra* note 7, Mikhaylova, *supra* note 14, Greengrass *supra* note 38, Feist v. Rural, *supra* note 200.

²¹¹ *See generally* 17 U.S.C. § 103 (2006), 17 U.S.C. § 102 (2006), Feist v. Rural, *supra* note 200.

²¹² Feist v. Rural, *supra* note 200 at 345.

²¹³ Id.

²¹⁴ Greengrass *supra* note 38 at 273.

²¹⁵ Id.

²¹⁶ Oliar and Sprigman, *supra* note 7 at 1798.

²¹⁷ Greengrass *supra* note 38 at 273.

²¹⁸ Oliar and Sprigman, *supra* note 7 at 1801-1808.

²¹⁹ Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 Wash. & Lee L. Rev. 795, 800 (2001).

²²⁰ 17 U.S.C. § 101

²²¹ Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 Wash. & Lee L. Rev. 795, 801 (2001)

-
- ²²² *Id.* (citing Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 Vand. L. Rev. 1, 2 (1985)).
- ²²³ *Id.* at 802.
- ²²⁴ *Id.* at 805.
- ²²⁵ 17 U.S.C. § 106(A) (2002).
- ²²⁶ Geoffrey F. Miller, *The Big Five personality traits of professional comedians compared to amateur comedians, comedy writers, and college students*, 79-83 (2009) <https://my.psychologytoday.com/files/attachments/95822/personality-traits-stand-comedians.pdf>.
- ²²⁷ *Id.*
- ²²⁸ *Id.*
- ²²⁹ Lee *supra* note 220 at 801.
- ²³⁰ *Id.*
- ²³¹ *Id.* at 804-805.
- ²³² Oliar and Sprigman, *supra* note 7 at 1812.
- ²³³ *Id.* at 1814-1821.
- ²³⁴ 17 U.S.C. § 106(A) (2002).
- ²³⁵ *Id.*
- ²³⁶ *Id.*
- ²³⁷ *Id.*
- ²³⁸ 17 U.S.C. §101
- ²³⁹ Bolles, *supra* note 154.
- ²⁴⁰ *Id.* at 241(citing See v. Durang, 711 F.2d 141, 143 (9th Cir. 1983)).
- ²⁴¹ *Id.*
- ²⁴² Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).